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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

NORMAN EUGENE YARTZ,

Defendant and Appellant.

F078499

(Super. Ct. No. F18907315)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Fresno County. Wayne R. Ellison, Judge. (Retired judge of the Fresno County Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

Kendall Dawson Wasley, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Lewis A. Martinez and Amanda D. Cary, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Levy, Acting P.J., Poochigian, J. and Detjen, J.

## **INTRODUCTION**

Appellant/defendant Norman Yartz was convicted of possession or control of child pornography (Pen. Code,<sup>1</sup> § 311.11, subd. (b)) and sentenced to prison. On appeal, he contends the court improperly ordered him to pay a restitution fine and other fees in violation of his due process rights pursuant to *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). We affirm.

## **FACTS**

Defendant was adjudged a sexually violent predator in 2006 and again in 2016, and committed to the California Department of State Hospitals at Coalinga (the hospital).<sup>2</sup>

In June 2013, July 2014, and May 2016, while housed at the hospital, defendant was found in possession of digital media cards and other electronic devices that contained photographs and videos of child pornography.

On February 10, 2017, officers with the hospital's police unit served defendant with an arrest warrant in his room. When the officers arrived, defendant tried to conceal an electronic memory card but they retrieved it. The officers seized additional digital

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<sup>1</sup> All further statutory citations are to the Penal Code unless otherwise indicated.

<sup>2</sup> According to the probation report, defendant (born 1948) was committed to the California Youth Authority in 1965 on a juvenile petition for annoying or molesting a child under the age of 18 years (§ 647.6), for committing an act of incest on his 14-year-old sister. As an adult, he was convicted in 1971 of unlawful sexual intercourse with a person under the age of 18 years; the victim was his 10-year-old stepdaughter (§ 261.5). He was sentenced to six months to 50 years in prison, and released in 1978. In 1978, defendant was convicted of committing a lewd or lascivious act on a child under the age of 14 years (§ 288); the victim was his girlfriend's nine-year-old daughter. He was sentenced to five years in prison and released in 1982. In 1984, he was convicted of violating section 288, subdivision (b), commission of a lewd or lascivious act by force or violence; according to defendant, the victims were his biological daughter and a neighbor's daughter.

media storage devices from his room. The devices contained hundreds of child pornography videos.

### **PROCEDURAL BACKGROUND**

On May 24, 2018, defendant pleaded no contest to three counts of possession or control of child pornography, while having a prior felony conviction of a crime requiring registration as a sex offender under section 290 (§ 311.11., subd. (b)), and admitted a prior strike conviction, for an indicated sentence of 12 years. On September 26, 2018, the court decided not to impose the indicated sentence and granted defendant's motion to withdraw his plea. The case was subsequently dismissed.

On October 25, 2018, the felony complaint was refiled against defendant under a different number. The new complaint charged him with one count of possession or control of child pornography on February 10, 2017, while having a prior felony conviction of a crime requiring registration as a sex offender under section 290 in 1984 (§ 311.11, subd. (b)), with one prior strike conviction for felony commission of a lewd or lascivious act on a child under the age of 14 years in 1984. (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)).

On the same day, defendant pleaded no contest to the charged offense and admitted the prior strike conviction.

On November 27, 2018, the court sentenced defendant, who was 69 years old, to the upper term of six years, doubled to 12 years as the second strike sentence. The court followed the recommendation in the probation report and ordered defendant to pay a \$3,600 restitution fine (§ 1202.4, subd. (b)) and suspended the parole revocation fine of \$3,600 (§ 1202.45).<sup>3</sup> The court also imposed a \$40 court operations assessment fee (§ 1465.8), and a \$30 court facilities assessment fee (Gov. Code, § 70373). Defendant

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<sup>3</sup> In his opening brief, defendant correctly states the amount of the restitution fine, but later erroneously states the restitution fine was \$300.

did not object to the court's orders. The court found he did not have the ability to pay a \$500 fee pursuant to section 290.3.

On November 30, 2018, defendant filed a timely notice of appeal.

On March 25, 2019, appellate counsel wrote to the superior court to comply with section 1237.2, and requested the court vacate the restitution fine and fees because he was indigent and lacked the ability to pay, based to the recently decided opinion in *Dueñas*.

On March 29, 2019, the superior court denied defendant's request.

### **DISCUSSION**

Defendant relies on *Dueñas* and argues the court improperly imposed the restitution fine and fees in violation of his due process rights without determining whether he had the ability to pay these amounts. Defendant asserts the order imposing the fees must be stricken, and the restitution fine must be stayed until the People prove he has the ability to pay the fine. Defendant argues he did not forfeit review of the issue since *Dueñas* had not been decided at the time of the sentencing hearing, it constituted an unforeseen change in the law, and any objection would have been futile.

*Dueñas* held that “due process of law requires the trial court to conduct an ability to pay hearing and ascertain a defendant's present ability to pay” before it imposes any fines or fees. (*Dueñas, supra*, 30 Cal.App.5th at pp. 1164, 1167.)<sup>4</sup>

We disagree with *Dueñas* and find the matter need not be remanded on this issue. As we recently explained in *People v. Aviles* (2019) 39 Cal.App.5th 1055 (*Aviles*), we believe *Dueñas* was wrongly decided and an Eighth Amendment analysis is more appropriate to determine whether restitution fines, fees, and assessments in a particular case are grossly disproportionate and thus excessive. (*Aviles*, at pp. 1068–1072.) Under

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<sup>4</sup> The California Supreme Court is currently considering whether trial courts must consider a defendant's ability to pay before imposing or executing fines, fees, and assessments; and if so, which party bears the applicable burden of proof. (See *People v. Kopp* (2019) 38 Cal.App.5th 47, 94–98, review granted Nov. 13, 2019, S257844.)

that standard, the fine and fees imposed in this case are not grossly disproportionate to defendant's level of culpability and the harm he inflicted, and thus not excessive under the Eighth Amendment. (*Aviles*, at p. 1072.)

More importantly, even if *Dueñas* applied to this case, defendant has forfeited any challenge to his alleged inability to pay the restitution fine, fees, and assessments. The court ordered him to pay a restitution fine of \$3,600 under section 1202.4, subdivision (b). When the court imposes a restitution fine greater than the \$300 statutory minimum amount, "[s]ection 1202.4 expressly contemplates an objection based on inability to pay." (*People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153 (*Frandsen*); *Aviles*, *supra*, 39 Cal.App.5th at p. 1073.)

While *Dueñas* had not been decided at the time of defendant's sentencing hearing, defendant had the statutory right to object to the \$3,600 restitution fine and demonstrate his alleged inability to pay, and such an objection "would not have been futile under governing law at the time of his sentencing hearing." (*Frandsen*, *supra*, 33 Cal.App.5th at p. 1154; *Aviles*, *supra*, 39 Cal.App.5th at pp. 1073–1074.) In addition, any objections to the assessments imposed under section 1465.8 and Government Code section 70373 would not have been futile. "Although both statutory provisions mandate the assessments be imposed, nothing in the record of the sentencing hearing indicates that [the defendant] was foreclosed from making the same request that the defendant in *Dueñas* made in the face of those same mandatory assessments. [The defendant] plainly could have made a record had his ability to pay actually been an issue. Indeed, [he] was obligated to create a record showing his inability to pay the ... restitution fine, which would have served to also address his ability to pay the assessments." (*Frandsen*, *supra*, 33 Cal.App.5th at p. 1154; *Aviles*, *supra*, 39 Cal.App.5th at p. 1074.)<sup>5</sup>

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<sup>5</sup> Defendant's post-judgment letter to the superior court, dated March 25, 2019, does not excuse his failure to object to the fees and the \$3,600 restitution fine at the sentencing hearing. Defendant's letter was required to perfect appellate review and comply with

Finally, even if defendant did not forfeit the issue, any error under *Dueñas* is necessarily harmless since defendant has the ability to pay the restitution fine, fees, and assessments over the course of his prison sentence. (*Aviles, supra*, 39 Cal.App.5th at pp. 1075–1077.)

“ ‘ “Ability to pay does not necessarily require existing employment or cash on hand.” [Citation.] “[I]n determining whether a defendant has the ability to pay a restitution fine, the court is not limited to considering a defendant’s *present* ability but may consider a defendant’s ability to pay in the future.” [Citation.] This include[s] the defendant’s ability to obtain prison wages and to earn money after his release from custody. [Citation.]’ [Citations.]” (*Aviles, supra*, 39 Cal.App.5th at p. 1076.)

We can infer from the instant record that defendant has the ability to pay the aggregate amount of the fine and fees from probable future wages, including prison wages. (*Aviles, supra*, 39 Cal.App.5th at p. 1076; *People v. Ellis* (2019) 31 Cal.App.5th 1090, 1094; *People v. Douglas* (1995) 39 Cal.App.4th 1385, 1397.) There is nothing in the record to show that defendant would be unable to satisfy the fine and fees imposed by the court while serving his prison term, even if he fails to obtain a prison job. While it may take defendant some time to pay the amounts imposed in this case, that circumstance does not support his inability to make payments on these amounts from either prison wages or monetary gifts from family and friends during his prison sentence. (See, e.g., *People v. Potts* (2019) 6 Cal.5th 1012, 1055–1057; *People v. DeFrance* (2008) 167 Cal.App.4th 486, 505; *People v. Lewis* (2009) 46 Cal.4th 1255, 1321.) Based on the

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section 1237.2, which states that “[a]n appeal may not be taken by the defendant from a judgment of conviction on the ground of an error in the imposition or calculation of fines, penalty assessments, surcharges, fees, or costs unless the defendant first presents the claim in the trial court at the time of sentencing, or if the error is not discovered until after sentencing, the defendant first makes a motion for correction in the trial court, which may be made informally in writing.”

record before this court, defendant has the ability to pay the fine and fees, and any error under *Dueñas* is harmless.<sup>6</sup>

Finally, defendant points to the court's decision not to impose a fine under section 290.3, subdivision (a) as showing he also lacked the ability to pay the restitution fine and fees. The probation report recommended the imposition of a \$300 fine pursuant to section 290.3, subdivision (a), which states:

“Every person who is convicted of any offense specified in subdivision (c) of Section 290 shall, in addition to any imprisonment or fine, or both, imposed for commission of the underlying offense, be punished by a fine of three hundred dollars (\$300) upon the first conviction or a fine of five hundred dollars (\$500) upon the second and each subsequent conviction, unless the court determines that the defendant does not have the ability to pay the fine.”<sup>7</sup>

In determining whether the defendant has the ability to pay a section 290.3 fine, the court may consider “all evidence relevant to ability to pay, *including the amount of any fine or restitution ordered* and the defendant's potential future income.” (*People v. Burnett* (2004) 116 Cal.App.4th 257, 261, italics added.) At the sentencing hearing, the court declined to impose this fine and found defendant did not have the ability to pay it. The court's decision to impose the restitution fine and fees is not inconsistent with the finding that defendant did not have the ability to pay the section 290.3 fine given the different provisions of the relevant statutes.

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<sup>6</sup> The People state it would be appropriate to remand the case for an ability to pay hearing as to the fees imposed pursuant to section 1465.8 and Government Code section 70373 because they are the “non-punitive assessments.” We decline to remand and note “the interpretation of a statute is a question of law for the court and is not governed by a [party's] ‘concession of its meaning.’ [Citation.]” (*Porter v. Board of Retirement of Orange County Employees Retirement System* (2013) 222 Cal.App.4th 335, 349; *Tun v. Wells Fargo Dealer Services, Inc.* (2016) 5 Cal.App.5th 309, 327; *Bell v. Tri-City Hospital Dist.* (1987) 196 Cal.App.3d 438, 449, disapproved on another ground as stated in *State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1244.)

<sup>7</sup> Defendant was subject to this fine based on his qualifying conviction in this case for violating section 311.11. (§ 290.3, subd. (c), § 290, subd. (c).)

**DISPOSITION**

The judgment is affirmed.